

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

September 25, 2015

IN RE:

**PETITION OF LAUREL HILLS CONDOMINIUMS
PROPERTY OWNERS ASSOCIATION FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY**

**DOCKET NO.
12-00077**

**ORDER DENYING APPEAL AND AFFIRMING HEARING OFFICER'S ORDER
DENYING CONSUMER ADVOCATE'S PETITION TO INTERVENE**

This matter came before Vice Chairman David F. Jones, Director Kenneth C. Hill, and Director James M. Allison of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on June 29, 2015, to consider the *Appeal to the Authority to Grant the Petition to Intervene of the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General* ("*Appeal to the Authority Panel*") filed with the TRA on April 9, 2015. In its *Appeal to the Authority Panel*, the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General ("Consumer Advocate" or the "Advocate") urges the Authority to overturn the Hearing Officer's decision to deny its petition to intervene in this proceeding, as memorialized in the *Order Denying Consumer Advocate's Petition to Intervene* entered February 4, 2015 ("*Initial Order*" attached as Exhibit A).

BACKGROUND

As directed by the Authority panel in TRA Docket No. 12-00030, this docket was initiated after due consideration of the preliminary investigation and findings of the TRA Staff

acting as a Party (“Party Staff”) on July 17, 2012, with the entry of the Hearing Officer’s *Order Requiring Laurel Hills Condominiums Property Owners Association to Appear and Show Cause Why a Cease and Desist Order and Civil Penalties & Sanctions Should Not be Imposed Against It for Violations of State Law* (“*Show Cause Order*”).¹ The *Show Cause Order* places the burden on Respondent Laurel Hills Condominiums Property Owners Association’s (“Laurel Hills”) to demonstrate why the TRA should not take action against it for violations of state utility law, including Tenn. Code Ann. §§ 65-4-115, 65-4-201, 65-4-301(a), and 65-5-101, 102, and 103.² On August 8, 2012, upon the joint motion of Party Staff and Laurel Hills (collectively, the “Parties”), the Hearing Officer entered an *Agreed Order* holding the show cause proceedings in abeyance pending the resolution of TRA Docket No. 12-00030, *In re Petition of Laurel Hills Condominiums Property Owners Association for a Certificate of Public Convenience and Necessity* (“*CCN Petition*”), which had commenced on April 10, 2012.³

On April 18, 2013, the Authority entered an *Order Denying Certificate of Public Convenience and Necessity and Requiring Divestiture of Water System* (“*Divestiture Order*”) in TRA Docket No. 12-00030.⁴ The *Divestiture Order* denied Laurel Hills’ petition for a CCN to own and operate the public water system within the development known as Renegade Mountain located in Cumberland County, Tennessee, and ordered Laurel Hills to divest its ownership of the system, maintain safe, adequate, and reliable service pending such divestment, and to charge a just and reasonable rate for service, as established by the TRA.⁵ Laurel Hills appealed the Authority’s *Divestiture Order* to the Tennessee Court of Appeals, which affirmed the decision of the TRA in all respects, and to the Tennessee Supreme Court, which declined to review the

¹ *Show Cause Order* (July 17, 2012).

² *Id.*

³ *Agreed Order* (August 8, 2012).

⁴ On August 23, 2012, the Consumer Advocate was granted intervention in TRA Docket No. 12-00030, and thereafter, actively participated as party throughout the CCN proceedings.

⁵ *Divestiture Order* (April 18, 2013).

Opinion.⁶ Thereafter, on November 4, 2014, finding that abeyance of the show cause action was no longer warranted, the Authority granted Party Staff's motion and ordered the Hearing Officer to prepare this matter for hearing.⁷

On December 8, 2014, the Consumer Advocate filed a *Petition to Intervene* contending that it was entitled to intervene in the proceedings as a party in accordance with Tenn. Code Ann. § 4-5-310(a).⁸ Party Staff and Laurel Hills each objected and filed separate responses in opposition to the *Petition to Intervene* on December 30, 2014 and January 2, 2015, respectively.⁹ The Consumer Advocate was filed replies to the objections and opposition of Party Staff and Laurel Hills on January 22, 2015.¹⁰ On February 4, 2015, the Hearing Officer entered an *Initial Order* denying the Consumer Advocate's request to intervene and participate as a party in this proceeding for its failure to establish facts sufficient to demonstrate an entitlement to intervene as a party under Tenn. Code Ann. § 4-5-310(a) and further holding that discretionary intervention is not warranted under Tenn. Code Ann. § 4-5-310(b)).¹¹ Pursuant to TRA Rule

⁶ *Laurel Hills Condominiums Prop. Owners' Ass'n v. Tennessee Regulatory Auth.*, No. M2013-01392-COAR12CV, 2014 WL 1494126 (Tenn. Ct. App. Apr. 14, 2014), *perm. app. Denied* (Oct. 15, 2014).

⁷ *Order Granting Renewed Motion to Initiate Proceedings* (December 10, 2014).

⁸ In its *Petition to Intervene*, the Consumer Advocate contended that consumers have an interest in the proceeding, and that the violations of law alleged against Laurel Hills directly affected the interests and rights of Laurel Hills' customers, "particularly charging unauthorized rates and withholding service." In addition, the Consumer Advocate asserted that if Party Staff and Laurel Hills reached a settlement and the Consumer Advocate believed that the settlement was adverse to consumers' interests, it would not be allowed to contest the settlement agreement if it is not allowed to intervene as a party. Finally, the Consumer Advocate stated that "[o]nly by participating in this proceeding can the Consumer Advocate work adequately to protect the interests of consumers." *Petition to Intervene*, pp. 2 and 3-5 (December 8, 2014).

⁹ *Objection to Intervention Requests* (December 30, 2014) and *Respondent's Opposition to the Consumer Advocate's Division's Motion to Intervene* (January 2, 2015).

¹⁰ *Request of the Consumer Advocate and Protection Division of the Attorney General's Office to File a Reply to Party Staff's Objection to the Consumer Advocate's Petition to Intervene and Reply of the Consumer Advocate and Protection Division of the Attorney General's Office to the Party Staff's Objection to Petition to Intervene* (January 22, 2015) and *Request of the Consumer Advocate and Protection Division of the Attorney General's Office to File a Reply to Respondent Laurel Hills' Opposition to Consumer Advocate's Petition to Intervene and Reply of the Consumer Advocate and Protection Division of the Attorney General's Office to Respondent Laurel Hills' Objection to Petition to Intervene* (January 22, 2015).

¹¹ *Initial Order* (February 4, 2015). In addition, it should be noted that on February 2, 2015, the Hearing Officer entered an *Order Denying Petitions to Intervene* as to the intervention requests filed by Gary Haiser, *et al.*, and Eagles Nest, LLC, whom are actual and prospective customers of Laurel Hills, respectively. This Order was not appealed.

1220-1-2-.06(6), the Advocate filed a request for permission for interlocutory review by the panel of the Hearing Officer's *Initial Order* denying its *Petition to Intervene* on February 26, 2015. Without objection by Party Staff or Laurel Hills, the Hearing Officer granted the Consumer Advocate's request for interlocutory review on March 11, 2015.¹²

CONSUMER ADVOCATE'S APPEAL TO THE AUTHORITY PANEL

On April 9, 2015, the Consumer Advocate filed its *Appeal to the Authority Panel*, in which it incorporates by reference and attaches as exhibits, its *Petition to Intervene*, the Party Staff's Objection and Laurel Hills' Opposition to its intervention, its replies to the Party Staff and Laurel Hills, the *Initial Order*, its Request for Permission for Interlocutory Review by the Panel and the *Order Granting Interlocutory Review*.¹³ In its *Appeal to the Authority Panel*, the Advocate reiterates the positions set forth in its earlier pleadings that it has the duty and authority to represent the interests of Tennessee consumers of public utility services and that this docket "implicates the interests of consumers."¹⁴ Further, the Consumer Advocate contends that with the permission of the Attorney General, it is "fully authorized to 'participate or intervene as a party in any matter or proceeding before the [A]uthority or any other administrative, legislative or judicial body' in accordance with the [Uniform Administrative Procedures Act] and Authority rules."¹⁵ In addition, the Advocate asserts that its "participation will not delay the docket in any way" because it does not intend to file any discovery requests and will comply with all deadlines and procedural schedules.¹⁶ Finally, the Consumer Advocate contends that it should be

¹² *Order Granting Interlocutory Review* (March 11, 2015).

¹³ *Appeal to the Authority Panel*, with Exhibits A-1 through D (April 9, 2015).

¹⁴ *Appeal to the Authority Panel*, p. 3 (April 9, 2015).

¹⁵ *Id.*

¹⁶ *Id.* at 3-4.

permitted to intervene in the proceedings because its “enabling statute does not place any limitations on the Consumer Advocate’s participation.”¹⁷

In opposition to the Consumer Advocate’s *Appeal to the Authority Panel*, Laurel Hills maintains that the Consumer Advocate has no legal interest at stake in the proceeding and, therefore, the *Initial Order* should be upheld.¹⁸ In its *Opposition to Appeal*, Laurel Hills asserts that, under Tenn. Code Ann. § 65-4-118(b), the Consumer Advocate’s interests in TRA proceedings are “necessarily derivative of the consumer’s affected by that proceeding.” Laurel Hills states that this show cause proceeding solely involves a determination of whether Laurel Hills has violated the law, and, if so, what sanction is appropriate.¹⁹ Concurring with the Hearing Officer’s conclusion that the Consumer Advocate’s desire to participate in any settlement that might be reached is not a cognizable legal interest, Laurel Hills states that because the customers of Laurel Hills cannot add anything to the current proceeding, neither does the Consumer Advocate have any legal interest to represent. As such, the Consumer Advocate’s desire to play a role in potential settlement negotiations is too remote to justify party intervention.²⁰

In addition, Laurel Hills asserts that under Tenn. Code Ann. § 65-2-106, show cause proceedings, which are brought on the TRA’s own motion, contemplate participation by one party: the Respondent.²¹ The case is litigated against the Respondent based on the findings of the TRA’s preliminary investigation, the TRA functionally acts as a prosecutor, and no other entity can assume that role.²² “Given this dynamic and the issues at play it is simply unclear

¹⁷ *Id.* at 5.

¹⁸ *Respondent’s Opposition to Appeal to the Authority to Grant the Petition to Intervene of the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General (“Opposition to Appeal”)* (April 17, 2015).

¹⁹ *Opposition to Appeal*, p. 1.

²⁰ *Id.* at 1-2.

²¹ *Id.* at 2.

²² *Id.*

what role the [Consumer Advocate] seek to assume apart from the previously mentioned desire to participate in a ‘settlement.’”²³ Laurel Hills contends that the Advocate has failed to carry its burden to demonstrate a legal interest at stake in the proceeding, and that allowing intervention in this proceeding would only increase the cost and expense without any appreciable benefit gained by the Consumer Advocate’s inclusion.²⁴

In its *Objection to Appeal*, the Party Staff asserts that the show cause statute, Tenn. Code Ann. § 65-2-106, does not contemplate third-party intervention when the only issue is whether there has been a violation of the law.²⁵ Further, that the TRA’s practically plenary authority over the utilities within its jurisdiction empowers the Authority to conduct an enforcement action relying upon counsel employed by the Authority for that purpose.²⁶ Party Staff contends that the Consumer Advocate’s position that, with the Attorney General’s permission, it is entitled to intervene as a party in any and all TRA matters, regardless of whether there exists a consumer or other basis for intervention, is flawed.²⁷ Because a party to litigation must prepare a defense or counter position to that of its opposing parties, the Advocate’s position ignores the fact that intervention “must perforce interfere with the ‘orderly and prompt conduct’ of a case.” Furthermore, just because the Consumer Advocate insists that it will not engage in discovery does not prevent or inhibit it from presenting evidence, argument or engaging in cross-examination. This fact requires Party Staff to engage in discovery for the purpose of ascertaining the Consumer Advocate’s evidence and position or else litigate blindly.²⁸

In addition, Party Staff asserts that the Consumer Advocate fails to explain which facts lead them to conclude that consumers have an interest in the proceeding, nor which consumer

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Objection to Appeal*. p. 3 ¶ 11 (April 21, 2015).

²⁶ *Id.* at ¶ 12.

²⁷ *Id.* at ¶ 13.

²⁸ *Id.* at 14.

rights or interests are at issue.²⁹ Party Staff contends that there are no consumer rights or interests at stake in this proceeding because this is an enforcement action for violations of law.³⁰ Finally, Party Staff asserts that, just like anyone else that might want to intervene, the Consumer Advocate must demonstrate that its participation serves a purpose and will not interfere with an orderly and prompt hearing.³¹ As it has not established a sufficient basis upon which it can rightfully be allowed to intervene in this proceeding, Party Staff opposes the Consumer Advocate's request to intervene.³²

ORAL ARGUMENT

During the regularly scheduled Authority Conference held on June 29, 2015, the Consumer Advocate, along with the Parties, Party Staff and Respondent Laurel Hills, were each permitted an equal amount of time to present their respective positions on the Consumer Advocate's *Appeal to the Authority Panel*. In addition to reiterating the points that each set forth in their various written pleadings, the Consumer Advocate and the Parties also made the following additional arguments:

During oral argument, the Consumer Advocate acknowledged that the TRA has not previously agreed with its interpretation of Tenn. Code Ann. § 65-4-118, but asked that the panel reconsider its stance.³³ Moreover, the Advocate asserted that the Authority need not make a determination as to Tenn. Code Ann. § 65-4-118 because the Consumer Advocate "also qualifies as an intervener under the Uniform Administrative Procedures Act, specifically Tenn. Code Ann.

²⁹ *Id.* at 4, ¶ 16.

³⁰ *Id.*

³¹ *Id.* at 4, ¶ 17.

³² *Id.* at 4.

³³ Transcript of Authority Conference, p. 49 (June 29, 2015).

§ 4-5-310.”³⁴ The Consumer Advocate asserted that there was no harm in making the proceeding all-inclusive, and doing so would foster a better exchange of ideas and information.³⁵ Furthermore, in creating the Consumer Advocate, the Legislature recognized the inherent value of ensuring that consumers of utility services are specifically represented in matters before the TRA.³⁶ The Advocate asserted that the TRA should consider the important policy considerations concerning open government and transparency in a process that affects Tennessee consumers and that without intervention, the Consumer Advocate cannot appeal a decision of the TRA and is not privy to all aspects of the case, including informal discussions about settlement or other matters.³⁷

The Advocate further contended that the consumer interests at stake in Docket No. 12-00030, in which it is already an intervening party, are inextricably intertwined with the interests at stake in this docket.³⁸ As such, the consumers have an interest in the consequences to Laurel Hills as a result of its mistreatment and possibly overcharging of consumers.³⁹ And, that no due process or fundamental fairness issues are implicated by the Advocate’s party intervention into the proceedings.⁴⁰ In conclusion, the Consumer Advocate stated that it would like to see the matter resolved in a way that is beneficial to consumers and makes sense to the TRA and Laurel Hills, and urged the panel to allow it to intervene in the docket.⁴¹

In its presentation, Laurel Hills asserted that although the Consumer Advocate continues to insist that it has an interest in the docket, it has failed to specifically identify any such legal

³⁴ *Id.* at 50.

³⁵ *Id.* at 50.

³⁶ *Id.* at 50-51.

³⁷ *Id.* at 51-52.

³⁸ *Id.* at 61.

³⁹ *Id.* at 62.

⁴⁰ *Id.*

⁴¹ *Id.* at 53-54.

interest or right.⁴² Further, Laurel Hills confirmed that it has had discussions with Party Staff concerning whether it should voluntarily place the water system into receivership, but asserted that such discussions do not trigger a consumer interest and confuses this show cause proceeding with the substantive proceeding in which Laurel Hills was ordered to divest the water system.⁴³ Finally, Laurel Hills stated that this proceeding involves whether or not it violated any statutes or rules in the operation of the water system and, if so, what should be the consequences. As such, there is no consumer interest to be represented by the Consumer Advocate in this particular proceeding and intervention is inappropriate.⁴⁴

During oral argument, Party Staff stated that in the event that the utility was placed into receivership, the Consumer Advocate would have an opportunity to represent the interests of consumers as concerns any future purchaser of the system.⁴⁵ Further, concerning Docket No. 11-00065, a show cause investigation docket referenced by the Consumer Advocate, Party Staff noted that the Consumer Advocate was permitted to participate as party in that docket because the issues directly impact consumer rates. There, unlike in this case, the Advocate was able to demonstrate a legal interest or right of the consumers that was at stake in the proceeding.⁴⁶ Party Staff asserts that allowing the Advocate to intervene, despite the absence of an actual legal interest, places Party Staff in a position that is patently unfair in that it must argue against both Laurel Hills and the Advocate, whose positions may conflict and involve different interpretations of the facts, law, and theories of the case.⁴⁷ Finally, Party Staff contends that the Advocate's position that, so long as it has the permission of the Attorney General, Tenn. Code Ann. § 65-4-

⁴² *Id.* at 54-55.

⁴³ *Id.* at 55.

⁴⁴ *Id.* at 55-56.

⁴⁵ *Id.* at 56-57.

⁴⁶ *Id.* at 57-58. See, TRA Docket No. 11-00065, *In re Investigation as to Whether a Show Cause Order Should be Issued Against Berry's Chapel Utility, Inc. and/or Lynwood Utility Corporation for Violation of TRA Rule and Tennessee Statutes, Including But Not Limited to, Tenn. Code Ann. §§ 65-4-112, 65-4-113, 65-4-201, and 65-5-101.*

⁴⁷ *Id.* at 59-60.

118 entitles it to intervene in any and all cases before the Authority is erroneous and removes the TRA's authority to control its own dockets and to determine who may rightly appear before for it.⁴⁸

FINDINGS & CONCLUSIONS

During the Authority Conference, upon review and after due consideration, a majority of the panel found that the *Initial Order* was well-researched and provides a comprehensive and thorough analysis of the issues presented in the Consumer Advocate's *Petition to Intervene* and the subsequent related filings. As such, consistent with the text of the statute and the TRA's long-standing application of it, the Authority agrees that Tenn. Code Ann. § 65-4-118(b)(1) allows the Consumer Advocate to intervene in matters before the TRA, as well as other tribunals and Courts, for the purpose of representing the legal rights and interests of consumers of public utility services, and that Tenn. Code Ann. § 65-4-118(b)(1) is properly considered in conjunction with the intervention provisions of Tenn. Code Ann. § 4-5-310 and the TRA Rules.

Further, whereas the Consumer Advocate has a duty and the authority to represent as a party the legal rights and interests of consumers; as the governing agency, the TRA has the duty and charge to ensure that the laws and regulations concerning public utilities over which it has jurisdiction "are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the state are collected."⁴⁹ Pursuant to the powers delegated to it by the General Assembly, the Authority is solely responsible to carry out its duties and, unless specifically authorized, may not consign a third party to share in or execute its regulatory functions. To that end, under Tenn. Code Ann. § 65-2-106, the Authority is empowered to initiate show cause proceedings requiring public utilities to account for violations of the TRA's statutes, rules, and

⁴⁸ *Id.* at 60.

⁴⁹ Tenn. Code Ann. § 65-1-113.

orders, as justified by its own preliminary investigations. While third parties may be granted intervention when such is essential and proper, the only parties contemplated as necessary to the proceedings under Tenn. Code Ann. § 65-2-106 are the Authority and the Respondent utility.

The Consumer Advocate seeks party intervention under Tenn. Code Ann. § 4-5-310(a).⁵⁰ As was aptly discussed in the Hearing Officer's *Initial Order*, the Authority agrees and finds that, as set forth in the *Show Cause Order*, the matters at issue in this docket encompass whether Laurel Hills has violated the statutes or rules of the Authority, and, if so, whether and to what extent a penalty for such violation should be imposed. These determinations affect Laurel Hills' rights and interests, but do not involve any specific rights or interests held by the consumers of the utility services provided by Laurel Hills. In fact, the rights and interests of the Utility's customers concerning the charging of unauthorized rates and the provision or withholding of safe, adequate, and reliable water service were adjudicated by the TRA in Docket No. 12-00030 and subsequently affirmed by the Court of Appeals. The Consumer Advocate and private counsel, whom represented several specifically identified customers of Laurel Hills, intervened and participated as parties in that case. As the consumers' rights and interests as to service and rates was resolved in Docket No. 12-00030 and the litigation that followed, they will not again be considered in this proceeding.

In addition, seeking party status for the purpose of participating in negotiations and a potential settlement reached between the Authority and its regulated utility concerning the violations and possible penalties at issue in this proceeding or in order to have standing to appeal a decision of the TRA to which one might not fully subscribe, as cited by the Consumer Advocate, are not proper bases for intervention. These reasons do not constitute legal rights, duties, privileges, immunities or other legal interests held by consumers of utility services for

⁵⁰ *Petition to Intervene*, ¶¶ 6-7 (December 8, 2014).

which party intervention would be required under Tenn. Code Ann. § 4-5-310(a). Thus, while the Consumer Advocate might have a general interest in participating in this proceeding, this matter does not involve or require representation for any specific consumer rights or legal interests.

Finally, whether by right or mandatory intervention in Tenn. Code Ann. § 4-5-310(a) or discretionary intervention under Tenn. Code Ann. § 4-5-310(b), all parties seeking to intervene must demonstrate that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by the intervention. In light of the valid concerns of fundamental fairness and due process raised by the Parties, the panel is not persuaded, and thus concurs with the findings and conclusions of Hearing Officer, that the Consumer Advocate's participation in this case will not impair justice or the orderly and prompt conduct of the proceedings.

Therefore, upon due consideration of the record in this matter, and with particular regard to the written pleadings filed by the Consumer Advocate and Parties and the oral arguments of counsel presented during the June 29, 2015 Authority Conference, a majority of the panel voted to deny the *Appeal to the Authority Panel* and to affirm the Hearing Officer's *Initial Order*.⁵¹

IT IS THEREFORE ORDERED THAT:

1. The *Appeal to the Authority to Grant the Petition to Intervene of the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General* filed by the Consumer Advocate and Protection Division of the Tennessee Attorney General on April 9, 2015 is denied.

⁵¹ Director Allison did not vote with the majority, and instead found that it would be appropriate to grant the Consumer Advocate's *Petition to Intervene* under the discretionary standards of Tenn. Code Ann. § 4-5-310(b).

2. The *Order Denying Consumer Advocate's Petition to Intervene* entered by the Hearing Officer on February 4, 2015, attached to this Order as Exhibit A, is affirmed and adopted as though fully rewritten herein.

3. Any party aggrieved by the decision in this matter may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days of the date of this Order.

Vice Chairman David F. Jones and Director Kenneth C. Hill concur. Director James M. Allison dissented.

ATTEST:



Earl R. Taylor, Executive Director

Exhibit A

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 4, 2015

IN RE:

SHOW CAUSE PROCEEDING AGAINST LAUREL
HILLS CONDOMINIUMS PROPERTY OWNERS
ASSOCIATION FOR ALLEGED VIOLATIONS OF
TENN. CODE ANN 65-4-201, 65-4-301(A), 65-5-102, 65-
4-101 AND/OR 65-4-103, AND 65-4-115

DOCKET NO.
12-00077

ORDER DENYING CONSUMER ADVOCATE'S PETITION TO INTERVENE

This matter is before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") upon a *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Tennessee Attorney General ("Consumer Advocate or "CAPD") on December 8, 2014.

BACKGROUND

On July 17, 2012, the Hearing Officer in this docket issued an *Order Requiring Laurel Hills Condominiums Property Owners Association to Appear and Show Cause Why a Cease and Desist Order and Civil Penalties & Sanctions Should not be Imposed Against It for Violations of State Law* ("Show Cause Order"). The *Show Cause Order* was issued as a result of proceedings held in TRA Docket No. 12-00030, in which Laurel Hills Condominiums Property Owners Association ("Laurel Hills") applied for a Certificate of Public Convenience and Necessity ("CCN"). On April 18, 2013, the panel in TRA Docket No. 12-00030 issued an *Order* denying the CCN and ordering Laurel Hills

to divest its water system.¹ Laurel Hills appealed the panel's decision to the Court of Appeals and to the Tennessee Supreme Court.

On October 21, 2014, Compliance Division Staff, acting as a Party ("Party Staff"), filed the *Renewed Motion to Initiate Proceedings* ("Motion") requesting that the Hearing Officer set this matter for Hearing. In support of the *Motion*, Party Staff stated:

On April 14, 2014, the Court of Appeals for the Middle District of Tennessee upheld the Authority's decision in docket number 12-00030. Laurel Hills Condominiums Property Owners Association filed an application for permission to appeal the Court of Appeals decision in docket number 12-00030. On October 15, 2014, the Tennessee Supreme Court denied Laurel Hills Condominiums Property Owners Association application. At this time there is no reason to continue to delay the proceedings.²

During the regularly scheduled Authority Conference held on November 4, 2014, the panel considered the *Motion*. The panel found that since the appellate court proceedings had concluded in TRA Docket No. 12-00030, abeyance of further TRA proceedings was no longer warranted and, therefore, unanimously voted to grant Party Staff's *Motion*.

PETITION TO INTERVENE

In its *Petition to Intervene*, the Consumer Advocate states that this proceeding is a contested case proceeding and "consumers have an interest in the proceeding."³ According to the Consumer Advocate, it has met the three requirements of Tenn. Code Ann. § 4-5-310(a) because:

(1) the Petition is timely; (2) the Petitioner's 'rights, duties, privileges, immunities or other legal interest may be determined and the Petitioner also qualifies as an Intervenor under Tenn. Code Ann. § 65-5-118; and (3) the 'interests of justice and the prompt conduct of the proceedings shall not be impaired.[']

¹ See *In re: Petition of Laurel Hills Condominiums Property Owners Association for a Certificate of Public Convenience and Necessity*, TRA Docket No. 12-00030, *Order Denying Certificate of Public Convenience and Necessity and Requiring Divestiture of Water System* (April 18, 2013) ("Order"). A full account of the TRA proceedings prior to and subsequent to the issuance of the *Show Cause Order* is set forth in TRA Docket No. 12-00030.

² *Renewed Motion to Initiate Proceedings*, p. 1 (October 21, 2014). In addition, Party Staff filed in TRA Docket No. 12-00030 a copy of the Mandate issued from the Tennessee Court of Appeals and related appellate court filings. The TRA Order was affirmed in all respects. See *Laurel Hills Condominiums Property Owners' Association v. Tennessee Regulatory Authority*, 2014 WL 1494126 (Tenn. Ct. App. Apr. 14, 2014), *perm. app. denied* (Tenn. Oct. 15, 2014).

³ See *Petition to Intervene* p. 2 (December 8, 2014).

The CAPD maintains that the alleged violations against Laurel Hills directly affect the interests and rights of Laurel Hills' customer, "particularly charging unauthorized rates and withholding service."⁴ In addition, the CAPD asserts that if there is a settlement agreement that is adverse to consumers' interests, it will not be able to contest such a settlement agreement if it is not allowed to intervene.⁵ The CAPD states that "[o]nly by participating in this proceeding can the Consumer Advocate work adequately to protect the interests of consumers."⁶

RESPONSES TO CAPD PETITION TO INTERVENE

LAUREL HILLS

Laurel Hills filed *Respondent's Opposition to the Consumer Advocate Divisions' Motion to Intervene* ("*Respondent's Opposition*") on January 2, 2015. Laurel Hills states the Consumer Advocate "seeks intervention in this case as a result of unidentified interests that customers have in the Proceeding. This Proceeding strictly entails whether Laurel Hills purportedly violated state law and has no impact on any customers of Laurel Hills."⁷ Laurel Hills states that in a show cause action only one party is contemplated by the statute and that the "TRA then functionally acts as a prosecutor of this civil enforcement proceeding and no other entity can assume that role."⁸ Quoting *State v. Brown and Williamson Tobacco Corp.*, Laurel Hills asserts "the Supreme Court held that where the State brings suit in its official capacity as sovereign to enforce state law, third parties 'do not have a substantial legal interest in the State's suit entitling them to intervene.'"⁹ Laurel Hills argues that in this proceeding, the TRA seeks to impose a civil penalty against Laurel Hills for purported violations of state law and enjoin it from continuing such purported violations.¹⁰ Further,

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.* at 5.

⁷ *Respondent's Opposition*, p. 1 (January 2, 2015).

⁸ *Id.* at 2.

⁹ *Id.* citing *State v. Brown and Williamson Tobacco Corp.*, 18 S.W.3d 186 (Tenn. 2000).

¹⁰ *Id.*

Laurel Hills argues “it is simply unclear what role the CAD [Consumer Advocate] seeks to assume and they do not attempt whatsoever to define such a role. In fact, they cite to no statute, law, or even fact that would justify their intervention in this Proceeding.”¹¹ In addition, Laurel Hills maintains that “[i]ncluding them [the CAPD] in this proceeding would only add to the cost and expense of this Proceeding without any appreciable benefit gained by their inclusion.”¹²

TRA PARTY STAFF

TRA Party Staff filed its *Objection to Intervention Requests* on December 30, 2014 stating that “[t]he only parties that are entitled under the law to participate in a Show Cause proceeding are Party Staff appointed by the TRA and the respondent utility.”¹³ Party Staff states this proceeding is an enforcement action against Laurel Hills and “the Show [C]ause statute does not contemplate third party intervention when the only issue is whether there has been a violation of the law.”¹⁴ Party Staff argues that the Consumer Advocate’s *Petition to Intervene* is “devoid of any facts that would create a basis for intervention.”¹⁵ Further, Party Staff asserts that the Consumer Advocate has been silent regarding the interests they seek to protect because there are none and this proceeding “is simply an enforcement action against the company for violations of law.”¹⁶

REQUESTS TO REPLY

On December 22, 2014, the Hearing Officer issued an *Order Extending Time to Respond to Petition to Intervene and Holding Procedural Schedule in Abeyance*, which gave Party Staff until January 30, 2015 to respond to the CAPD’s *Petition to Intervene*, and held the procedural schedule in abeyance until a new schedule was issued.

On January 22, 2015, the Consumer Advocate filed a *Request of the Consumer Advocate*

¹¹ *Id.*

¹² *Id.*

¹³ See *Objection to Intervention Requests*, p. 1 (December 30, 2014).

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

and Protection Division of the Attorney General's Office to File a Reply to Party Staff's Objection to the Consumer Advocate's Petition to Intervene ("Request to Reply to Party Staff") and its Reply of the Consumer Advocate and Protection Division of the Attorney General's Office to the Party Staff's Objection to Petition to Intervene ("Reply to Party Staff"). The Consumer Advocate also filed its *Request of the Consumer Advocate and Protection Division of the Attorney General's Office to File a Reply to Respondent Laurel Hills' Objection to Consumer Advocate's Petition to Intervene ("Request to Reply to Respondent")* and its *Reply of the Consumer Advocate and Protection Division of the Attorney General's Office to Respondent Laurel Hills' Objection to Petition to Intervene ("Reply to Laurel Hills")*.

Both Requests to Reply state "[t]he Consumer Advocate believes that a reply would be helpful to the Authority in determining the status of its Petition to Intervene because significant legal issues concerning the Consumer Advocate's duties and responsibilities have been raised" by Party Staff and Laurel Hills in their Objections.¹⁷ Since there have been no objections filed to the Requests to Reply, the Hearing Officer will grant them.

In its *Reply to Party Staff*, the CAPD argues that consumers have a specific interest in this proceeding and that it has properly given notice to Party Staff as to why intervention is necessary.¹⁸ According to the CAPD, the legal rights of Laurel Hills' customers are at issue in this docket and "if a utility engages in wrongdoing of the type alleged by TRA Party Staff, the consumer interest is necessarily implicated."¹⁹ The CAPD contends that "[c]harging unauthorized rates and refusing to provide service to customers are clearly matters of interest to consumers, not just issues between the TRA and Laurel Hills. Therefore it is proper for the Consumer Advocate to intervene in this matter because its enabling statute gives it the authority to represent the interests of Tennessee consumers

¹⁷ *Request to Reply to Respondent*, p. 1 (January 22, 2015); *Request to Reply to Party Staff*, p. 1 (January 22, 2015).

¹⁸ *Reply to Party Staff*, p. 1 (January 22, 2015).

¹⁹ *Id.* at 3.

of public utilities services.”²⁰ The Consumer Advocate also argues that “[w]ithout intervention, the Consumer Advocate would not be able to fully participate in these proceedings or be able to appeal a decision of the Authority that it believes is adverse to consumers, nor would it be able to represent consumer interests if Laurel Hills were to appeal a decision of the Authority.”²¹ To support its argument, the Consumer Advocate cites two instances where Settlement Agreements between the Respondent and Party Staff in show cause dockets were rejected by the Authority and asserts that these instances demonstrate “the importance of Consumer Advocate participation when consumer interests are at stake.”²²

In its reply to the specific arguments presented by TRA Party Staff, the Consumer Advocate argues that Party Staff’s role is to balance the interests of consumers and providers. Further, the CAPD argues, Laurel Hills argues for itself, but there is “no one to represent the consumer interest in the proceeding if the Consumer Advocate does not intervene.”²³ Citing *Mid-South Indoor Horse Racing, Inc. v. Tennessee State Racing Commission*, the Consumer Advocate argues that “the General Assembly intended for the UAPA [Uniform Administrative Procedures Act] to apply to all administrative agencies unless they were specifically exempted. The TRA is not exempt from the UAPA.”²⁴ Therefore, the TRA “must conduct its proceedings in accordance with the UAPA, which allows intervention in contested cases such as this show cause proceeding.”²⁵

The CAPD’s *Reply to Laurel Hills* mirrors the argument outlined in its *Reply to Party Staff* except for its response to specific arguments made by Laurel Hills. Countering an argument put forth by Laurel Hills, the Consumer Advocate asserts that “[t]his show cause docket is a contested case proceeding governed by the UAPA, and labeling it a ‘civil enforcement action’ does not make

²⁰ *Id.*

²¹ *Id.* at 4.

²² *Id.* at 5.

²³ *Id.* at 6.

²⁴ *Id.* at 8.

²⁵ *Id.*

it something other than what it is.”²⁶ Asserting that Laurel Hills’ reliance on *Brown and Williamson* is misplaced, the CAPD argues that “the case in *Brown and Williamson* was an action brought by the State of Tennessee through the Attorney General in a chancery court, not an action initiated by an administrative agency that is subject to the UAPA.”²⁷ Therefore, the CAPD concludes, “the holding of this case cannot be extended to apply to contested case proceedings before and administrative tribunal such as the TRA.”²⁸ The Consumer Advocate maintains that its intervention will not impede Laurel Hills’ ability to defend this action. Finally, the Consumer Advocate states that it does not plan to file any discovery requests and will comply with the procedural schedule.²⁹

FINDINGS & CONCLUSIONS

Under Tenn. Code Ann. § 65-2-107, “[a]ll persons having a right under the provisions of the laws applicable to the authority to appear and be heard in contested cases as defined in this chapter shall be deemed parties to such proceedings for the purposes of this chapter. In addition, the authority may upon motion allow any interested person to intervene and become a party to any contested case.” Along with its own statutes and rules, contested case proceedings before the Authority are governed by the provisions of Tenn. Code Ann. § 4-5-101, *et seq.*, the UAPA. Tenn. Code Ann. § 4-5-310 establishes the following criteria for considering mandatory and permissive requests for intervention:

- (a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:
 - (1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;
 - (2) The petition states facts demonstrating that the petitioner’s legal rights, duties, privileges, immunities or other legal interest may be determined in

²⁶ *Reply to Laurel Hills*, p. 6 (January 22, 2015).

²⁷ *Id.* at 7.

²⁸ *Id.*

²⁹ *Id.* at 8.

the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

- (3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.
- (b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.

Further, the UAPA provides that a Hearing Officer may, at any time, limit or impose conditions upon or otherwise modify an intervenor's participation in the proceedings. Similarly, TRA Rule 1220-01-02-.08 directs that requests for intervention before the Authority are to be made and considered as follows:

- (1) Petitions for intervention shall be granted in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-2-107.
- (2) A petition for intervention shall set forth with particularity those facts that demonstrate that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law. Intervention may be denied or delayed for failure to provide such specific facts.
- (3) A petition for intervention shall be filed at least seven (7) days prior to the date of the contested case hearing.

Timeliness

Under Tenn. Code Ann. § 4-5-310(a)(1) and TRA Rule 1220-01-02-.08(3), a petition for intervention must be filed at least seven (7) days prior to the date of the contested case hearing. The current proceeding is not subject to any particular statutory deadline and is in its early stages. The Consumer Advocate filed its *Petition to Intervene* prior to the formal commencement of discovery and before the establishment of a hearing date. Therefore, the Hearing Officer considers the Consumer Advocate's *Petition to Intervene* timely-filed.

Content & Requisite Showing

Tenn. Code Ann. 4-5-310(a)(2) and TRA Rule 1220-01-02-.08(2) require that a petition to

intervene state particular facts that demonstrate a legal right or interest held by the petitioner may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law. Tenn. Code Ann. § 65-4-118(b)(1) provides a general basis for the qualification of the Consumer Advocate as an intervening party to represent the interests of Tennessee public utility consumers, as follows:

The consumer advocate division has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division may, with the approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the authority or any other administrative, legislative or judicial body and initiate such proceeding, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and the rules of the authority.³⁰

Thus, according to the statute, with the approval of the Attorney General and upon satisfaction of the requisite showing for intervention under the UAPA and the TRA's Rules, the Consumer Advocate may be permitted to intervene as a party for the purpose of representing those Tennessee consumers of public utility services that have legal rights or interests that may be determined in proceedings before the TRA. Tenn. Code Ann. § 65-4-118(b)(1) provides for the Consumer Advocate's qualification as an intervenor under law, but in no way confers upon the Consumer Advocate an automatic or absolute right to participate in any particular Authority proceeding.

In the current proceeding, the Consumer Advocate asserts that consumers have an interest in this proceeding and that it has met the three (3) requirements for intervention and should, therefore, be allowed to intervene. According to the Consumer Advocate, "these alleged violations of law directly affect interests and rights of the customers of Laurel Hills, particularly charging unauthorized rates and withholding service."³¹ The Hearing Officer disagrees. Laurel Hills was denied a CCN and ordered to divest itself of the water system in TRA Docket No. 12-00030, and both the customers of Laurel Hills and the Consumer Advocate participated fully in that docket.

³⁰ Tenn. Code Ann. § 65-4-118(b)(1).

³¹ *Petition to Intervene*, p. 4 (December 8, 2014).

TRA Docket No. 12-00030 was appealed and the TRA's ruling was upheld by the Court of Appeals. As a result, the consumers' rights and interests in being charged and paying only rates authorized by the TRA and in receiving safe, adequate, and proper service have been adjudicated by the Authority and affirmed by the Court of Appeals.

This show cause docket has been initiated for the purpose of determining whether Laurel Hills has violated the law and, if so, what penalty should be imposed. Further, in its October 16, 2013 Order, the Chancery Court of Cumberland County ordered Laurel Hills to continue to provide water service to its customers until further order and set the rate for water service at \$33.10, the rate recommended by the TRA in Docket No. 12-00030. The outcome of the Authority's show cause proceeding neither impacts the provision of water service nor the rates that consumers are required to pay for the service. The Hearing Officer has already held that the customers of Laurel Hills do not have a legal interest that will be determined in this proceeding and denied the *Petition to Intervene* filed by actual customers of Laurel Hills.³² Thus, as Laurel Hills' customers do not have a legal interest in this proceeding, neither does the Consumer Advocate.

The Consumer Advocate contends that it should be allowed to intervene based on the possibility of the parties reaching a settlement agreement that might not be in the interests of the consumers. Once again, the legal rights or interests of consumers are not at issue in this proceeding. Any potential settlement agreement that might be reached, if any at all, would be an agreement between Laurel Hills and Party Staff in an attempt to resolve the violations and potential penalties against Laurel Hills and would not impact the rights or interests of consumers. This argument fails to show that a legal interest would be decided in this proceeding and does not provide sufficient basis for granting the Consumer Advocate's *Petition to Intervene*.

Moreover, if based on Laurel Hills' violation of law the Authority were to determine that a

³² See *Order Denying Petitions to Intervene*, p. 8 (February 2, 2015).

refund is due to customers, any calculations regarding the amount or method of refunding customers would be considered in a separate docket. At such time, the Consumer Advocate would then have an opportunity to file a petition to intervene in the new docket. In this regard, the Consumer Advocate's arguments appear to put the cart before the horse. The instant docket in which it seeks to intervene is where the Authority will consider whether there has been a violation of law and, if so, whether and to what extent a penalty should be imposed. Consumers do not have a legal right or interest in this proceeding because the issues involve a determination of whether Laurel Hills has violated state law or the TRA Rules. Therefore, the Hearing Officer finds that the Consumer Advocate has failed to show a factual basis to establish that the legal rights or interests of the customers of Laurel Hills may be determined in this proceeding, the Consumer Advocate's request to intervene does not satisfy the requirements for the mandatory intervention.

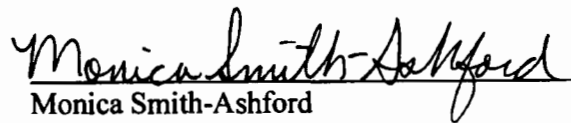
Procedural Due Process

Finally, Tenn. Code Ann. 4-5-310(a)(3) requires that the Hearing Officer grant a petition for intervention only upon determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention." Both Party Staff and the Respondent, Laurel Hills, have objected to the Consumer Advocate's request to intervene in this matter. Thus, weighing the impact of the proceedings upon the general rights and interests presented by the Consumer Advocate against the interests of justice, including the rights of the Respondent to fundamental fairness and due process and the need for orderly and prompt proceedings, the Hearing Officer is unable to find that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention. Furthermore, considering the purpose and specific considerations at issue in this docket, granting the Consumer Advocate's request for intervention appears contrary to the interests of justice and increases the likelihood for disruption in the administration of these proceedings.

Upon due consideration, the Hearing Officer concludes that while the *Petition to Intervene* was timely filed, the Consumer Advocate has failed to establish that the legal rights, duties, privileges, immunities or other legal interest of the customers of Laurel Hills may be determined in this proceeding. In addition, given the nature of this matter, the Hearing Officer cannot conclude that allowing intervention would not impair the interests of justice or the orderly and prompt conduct of this proceeding. For these reasons, the Hearing Officer determines that the Consumer Advocate's *Petition to Intervene* should be denied. Further, the Hearing Officer finds that the interests of justice and prompt conduct of the proceedings do not warrant allowing intervention under Tenn. Code Ann. § 4-5-310(b). Although these findings are based on the specific facts and circumstances of this case, this ruling is consistent with previous decisions of the Authority in recent proceedings of this nature.³³

IT IS THEREFORE ORDERED THAT:

The *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Tennessee Attorney General is denied.


Monica Smith-Ashford
Hearing Officer

cc: Docket File
Interested Parties

³³ See *In re: Show Cause Proceeding Against Tennessee Wastewater Systems, Inc. for Material Non-Compliance and/or Violation of State Law and Tenn. R. & Regs. 1220-04-13, et seq.*, Docket No. 14-00041, *Initial Order Denying Consumer Advocate's Petition to Intervene* (May 1, 2014); see also *In re: Show Cause Proceeding Against Tennessee Wastewater Systems, Inc. for Material Non-Compliance and/or Violation of State Law and Tenn. R. & Regs. 1220-04-13, et seq.*, Docket No. 14-00041, *Order Denying Petition to Appeal and Affirming the Initial Order of the Hearing Officer* (June 4, 2014).